Pioneer Conglomerate Sdn Bhd v Tenggara Kapital Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-2141–11 OF 2021
LEE SWEE SENG, HADHARIAH ISMAIL AND GUNALAN MUNIANDY JJCA
17 AUGUST 2023

Civil Procedure — Pleadings — Issue not pleaded — Parties bound by pleadings — Appellant claimed that payment made to respondent was interest-free loan — Appellant relied on payment vouchers — Respondent alleged that payment vouchers were tampered with or forged — Respondent claimed that payment by appellant was brokerage commissions — High Court found in favour of respondent — Whether High Court erred when determining issue of forgery which was not pleaded

Evidence — Burden of proof — Shifting of — Shifting of evidential burden — Appellant claimed that payment made to respondent was interest-free loan — Appellant relied on payment vouchers — Respondent alleged that payment vouchers were tampered with or forged — Respondent claimed that payment by appellant was brokerage commissions — Whether appellant had discharged its onus of proof — Whether onus of proof shifted to respondent to prove that the payment was brokerage commissions — Whether evidential burden shifted to respondent to prove allegation of forgery — Whether respondent had discharged its onus of proof — Evidence Act 1950 ss 101 & 102

Pioneer Conglomerate Sdn Bhd ('the appellant') was a company engaged in the business of investment holdings whereas Tenggara Kapital Sdn Bhd ('the respondent') was a company engaged in the business of wholesale of an assortment of goods. The center of the problem in the present appeal was in respect of the sum of RM7m advanced by the appellant to the respondent. The appellant claimed that this amount was an interest-free loan by the appellant to the respondent and the respondent had failed to re-pay the said amount. In support of this argument, the appellant relied on two payment vouchers ('exh P1' and 'exh P2') that bore the signature of the appellant's advisor ('DW2') and in both payment vouchers, the payments were stated as 'being paid as Advance to Tenggara Kapital Sdn Bhd' ('the notation'). In defence, the respondent contended that this amount was 'brokerage commissions' agreed to be paid to the respondent by the appellant's managing director ('PW1') for the respondent's work in securing the controlling interest in Ta Win Holdings Bhd for the appellant. The High Court judge ('the HCJ') dismissed the appellant's claim, hence, the present appeal. The main issue that arose for the court's

determination was whether on the basis of the documentary evidence adduced through PW1, the appellant had proven its case on a balance of probabilities. The appellant agreed that they bore the burden of proof under s 101 of the Evidence Act 1950 ('the EA') and the onus of proof or evidential burden under s 102 of the EA, but in the face of ample contemporaneous evidence adduced as proof of payment of RM7m to the respondent, which was unchallenged, the onus of proof shifted to the respondent to prove its case that the amount was brokerage commissions. In this regard, DW2 admitted having signed exhs P1 and P2 but argued that the notation on these payment vouchers was tampered with or forged, as such, these two exhibits ought to be rejected in toto.

Held, allowing the appeal, setting aside the HCJ's order with costs of RM70,000 here and below to the appellant subject to allocator, and ordering that the amount of RM20,000 already paid to the respondent's solicitors to be refunded:

(1) In the present case, the appellant's pleaded case was that the payment of a sum of RM7m was as an advance/interest free loan to the respondent and not as a commission. In this regard, the payment had been recorded in the appellant's payment vouchers and not denied by the respondent. Under these circumstances, the court upheld the appellant's contention that the onus of proof shifted to the respondent to prove that the purpose of payment of this substantial sum was as an alleged commission and not as an advancement as asserted by the appellant consistent with its pleadings. However, the court found that the assertion of this particular fact by the respondent was not supported by any documentary evidence (see paras 24–26).

(2) In respect to the dispute pertaining to the validity and probative value of exhs P1 and P2, the court concluded that the appellant had duly produced the original documents and DW2 himself had admitted having signed these exhibits, as such, the appellant had adduced sufficient evidence to discharge its onus of proof. Therefore, the evidential burden shifted to the respondent to adduce sufficient evidence to prove the serious allegation of forgery and/or tempering (see para 31).

(3) A mere bare allegation or statement that a written notation was a tampering of a document or forgery without more would not satisfy the burden of proof of forgery. The respondent's allegation of forgery and tampering was not supported by any credible evidence that could contradict the appellant's version of the issue at hand. The following undisputed facts as highlighted by the appellant were sufficient to contradict the respondent's allegation: (a) exhs P1 and P2 had been in the possession of the respondent since as early as August 2019; (b) no application was filed before the court to produce the original documents; (c) despite having knowledge of the document since 2019, the

respondent did not lodge a police complaint on the purported forgery/tampering against the appellant; and (d) despite knowing the case against the respondent, the respondent had elected not to produce any contemporaneous documents to disclaim the appellant's claim. In all the circumstances alluded to, the respondent had clearly failed to discharge the onus of proving this sweeping allegation that exhs P1 and P2, which were central to the appellant's claim were not genuine (see paras 29–31).

(4) The HCJ had not fully and judicially appreciated the fact that such an important allegation of tampering of exhs P1 and P2 with respect to the notation was not pleaded. It was settled law that when an issue or matter like forgery was unpleaded, there was no duty nor was the trial judge required to hear and determine a claim on that unpleaded issue or matter. Parties were bound by their pleadings (see paras 34 & 39).

(5) The HCJ had plainly erred in law and fact in arriving at his findings and ultimately his decision by reason of having failed to properly consider and judicially appreciate the facts and circumstances put before him in totality and to correctly apply established legal principles to the instant matter in dispute. This was particularly so in failing to appreciate that the respondent's unfounded contention of commission being the basis of the payment received resulted in immaterial evidence having been taken into account as opposed to undisputed documentary evidence (see para 38).

[Bahasa Malaysia summary

Pioneer Conglomerate Sdn Bhd ('perayu') adalah sebuah syarikat yang terlibat dalam perniagaan pegangan pelaburan manakala Tenggara Kapital Sdn Bhd ('responden') adalah sebuah syarikat yang terlibat dalam perniagaan pemborongan pelbagai barangan. Intipati permasalahan dalam rayuan ini adalah berkenaan dengan jumlah RM7 juta yang diberikan oleh perayu kepada responden. Perayu mendakwa bahawa jumlah ini adalah pinjaman tanpa faedah oleh perayu kepada responden dan responden telah gagal membayar semula jumlah tersebut. Bagi menyokong hujah ini, perayu bergantung kepada dua baucar pembayaran ('eksh P1' dan 'eksh P2') yang mempunyai tandatangan penasihat perayu ('DW2') dan dalam kedua-dua baucar pembayaran tersebut, pembayaran tersebut dinyatakan sebagai 'being paid as Advance to Tenggara Kapital Sdn Bhd' ('notasi tersebut'). Dalam pembelaan, responden berhujah bahawa jumlah ini adalah 'komisen broker' yang dipersetujui untuk dibayar kepada responden oleh pengarah urusan perayu ('PW1') bagi kerja yang dilakukan oleh responden dalam mendapatkan kepentingan kawalan dalam Ta Win Holdings Bhd untuk perayu. Hakim Mahkamah Tinggi ('HMT') menolak tuntutan perayu, oleh itu, rayuan semasa. Isu utama yang timbul untuk penentuan mahkamah adalah sama ada berdasarkan keterangan dokumen yang dikemukakan melalui PW1, perayu telah membuktikan kesnya di atas imbangan kebarangkalian. Perayu bersetuju

bahawa mereka menanggung beban pembuktian di bawah s 101 Akta Keterangan 1950 ('AK') dan tanggungjawab pembuktian atau beban bukti di bawah s 102 AK, tetapi berdasarkan keterangan kontemporari yang cukup yang dikemukakan sebagai bukti pembayaran RM7 juta kepada responden, yang tidak dicabar, tanggungjawab pembuktian beralih kepada responden untuk membuktikan kesnya bahawa jumlah tersebut adalah komisen broker. Dalam hal ini, DW2 mengakui telah menandatangani eksh P1 dan eksh P2 tetapi berpendapat bahawa notasi pada baucar pembayaran ini telah diubah atau dipalsukan, oleh itu, kedua-dua ekshibit ini harus ditolak secara keseluruhan.

Diputuskan, membenarkan rayuan, mengenepikan perintah HMT dengan kos RM70,000 di sini dan di bawah kepada perayu tertakluk kepada alokator, dan memerintahkan agar jumlah RM20,000 yang telah pun dibayar kepada peguam responden dikembalikan:

(1) Dalam kes ini, kes yang diplid oleh perayu adalah bahawa pembayaran sejumlah RM7 juta adalah sebagai pendahuluan/pinjaman tanpa faedah kepada responden dan bukan sebagai komisen. Dalam hal ini, pembayaran telah direkodkan dalam baucar-baucar pembayaran perayu dan tidak dinafikan oleh responden. Dalam keadaan ini, mahkamah bersetuju dengan hujah perayu bahawa tanggungjawab pembuktian beralih kepada responden untuk membuktikan bahawa tujuan pembayaran jumlah besar ini adalah sebagai komisen seperti yang didakwa dan bukan sebagai pendahuluan seperti yang ditegaskan oleh perayu selaras dengan permohonannya. Walau bagaimanapun, mahkamah mendapati bahawa penegasan fakta khusus ini oleh responden tidak disokong oleh keterangan dokumentari (lihat perenggan 24–26).

(2) Berkenaan dengan pertikaian yang berkaitan dengan kesahihan dan nilai probatif eksh P1 dan eksh P2, mahkamah membuat kesimpulan bahawa perayu telah mengemukakan dokumen asal dengan sewajarnya dan DW2 sendiri telah mengakui telah menandatangani ekshibit-ekshibit ini, oleh itu, perayu telah mengemukakan keterangan yang mencukupi untuk melepaskan tanggungjawab pembuktiannya. Oleh itu, beban bukti beralih kepada responden untuk mengemukakan keterangan yang mencukupi untuk membuktikan dakwaan serius berkenaan pemalsuan dan/atau pengubahan (lihat perenggan 31).

(3) Tuduhan atau pernyataan semata-mata bahawa notasi bertulis adalah pengubahan dokumen atau pemalsuan sahaja tidak akan memenuhi beban pembuktian bagi pemalsuan. Dakwaan pemalsuan dan pengubahan oleh responden tidak disokong oleh keterangan yang boleh dipercayai yang boleh menyanggah versi perayu mengenai isu yang ada. Fakta-fakta yang tidak dipertikaikan berikut seperti yang dikemukakan

oleh perayu cukup untuk menyanggah dakwaan responden: (a) eksh P1 dan eksh P2 telah berada dalam milikan responden sejak awal Ogos 2019; (b) tiada permohonan difailkan di hadapan mahkamah untuk mengemukakan dokumen-dokumen asal; (c) walaupun mempunyai pengetahuan tentang dokumen-dokumen tersebut sejak 2019, responden tidak membuat aduan polis mengenai pemalsuan/pengubahan yang didakwa terhadap perayu; dan (d) walaupun mengetahui tentang kes terhadap responden, responden telah memilih untuk tidak mengemukakan apa-apa dokumen kontemporari untuk menafikan tuntutan perayu. Dalam semua keadaan yang dirujuk, responden jelas gagal untuk melepaskan tanggungjawab untuk membuktikan dakwaan yang meluas ini bahawa eksh P1 dan eksh P2, yang menjadi sandaran perayu dalam tuntutannya, adalah palsu (lihat perenggan 29–31).

(4) Hakim Mahkamah Tinggi tidak menghargai sepenuhnya dan secara kehakiman hakikat bahawa tuduhan penting pengubahan eksh P1 dan eksh P2 berkenaan dengan notasi tersebut adalah tidak diplid. Ia adalah undang-undang yang mantap bahawa apabila isu atau perkara seperti pemalsuan tidak diplid, tidak ada kewajipan dan hakim perbicaraan tidak diminta untuk mendengar dan menentukan tuntutan mengenai isu atau perkara yang tidak diplid tersebut. Pihak-pihak terikat dengan pliding mereka (lihat perenggan 34 & 39).

(5) Hakim Mahkamah Tinggi telah jelas terkhilaf dalam undang-undang dan fakta dalam mencapai penemuannya dan akhirnya keputusannya kerana gagal untuk mempertimbangkan dengan betul dan secara kehakiman menghargai fakta dan keadaan yang diletakkan di hadapannya secara keseluruhan dan untuk menerapkan prinsip undang-undang yang ditetapkan dengan betul kepada perkara semasa dalam pertikaian. Hal ini terutamanya kerana gagal untuk menghargai bahawa hujahan responden yang tidak berasas mengenai komisen sebagai asas pembayaran yang diterima mengakibatkan keterangan tidak material telah diambil kira berbanding dengan keterangan dokumentari yang tidak dipertikaikan (lihat perenggan 38).]

Cases referred to

Great Eastern Life Assurance (M) Bhd v Siu Yan Tam & Anor and another appeal [2014] 5 MLJ 854, CA (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (folld)

Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien [2001] 1 MLJ 57, CA (refd)

Mariaton Darussalam & Anor v Abdul Rahim Omar & Ors [2016] 5 CLJ 611, HC (refd)

Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd [2016] 8 MLJ 739, HC (refd)
Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd [2016] 1 MLJ 375; [2015] 9 CLJ 902, CA (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)

Legislation referred to

Evidence Act 1950 ss 67, 73A, 73A, 101, 102, 103

Appeal from: *Pioneer Conglomerate Sdn Bhd v Tenggara Kapital Sdn Bhd* [2021] MLJU 2607 (High Court, Kuala Lumpur)

Rajakumaran Muthusamy (Ram Yogan Sivam) for the appellant.
Yeoh Tze Hwa (with Tay Shieh Chin and Eugene Khoo Yean Shern) (Yeoh Shim Siow & Lay Kuan) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned judge of the High Court ('LJ') given after conducting a full trial. It is against the decision of the LJ wherein the appellant's claim against the respondent was dismissed with costs of RM50,000. Both parties to the suit were private limited companies engaged in the business of investment holdings (plaintiff) and wholesale of an assortment of goods (defendant) respectively.

FACTUAL BACKGROUND

[2] The appellant's claim is that at the request of the respondent, the appellant had given an interest-free loan to the respondent in the amount of RM7m. The said sum was paid to the respondent in the following manner:

(a) RM5m was paid via the appellant's cheque No 000055 on 3 November 2017; and

(b) RM2m was paid via the appellant's cheque No 000054 on 15 November 2017.

[3] The appellant's case rests entirely on the two payment vouchers dated 3 November 2017 (exhs 'P1' and 'P2') as evidence of the loan. In both the payment vouchers, the payments were stated as 'being paid as Advance to Tenggara Kapital Sdn Bhd' ('the notation') and they bore the signature of Dato' Sri Ngu ('DW2') who was at the material times acting as the advisor to the appellant.

[4] The respondent had failed, refused and/or neglected to re-pay the appellant the said advancement. Hence, the appellant claims from the respondent the return of the said loan amount of RM7m.

[5] The respondent's defence is that the respondent does not deny receiving the two payments under the payment vouchers but maintains that the payments were 'brokerage commissions' agreed to be paid to the respondent by Dato' Chin Swee Chong ('PW1') who was the managing director of the appellant for securing for the appellant a controlling interest in one Ta Win Holdings Bhd ('Ta Win').

[6] There was only one issue for determination before the High Court, whether the payment of RM7m made to the respondent by the appellant was an advancement or a commission.

[7] After a full trial, the LJ dismissed the appellant's claim.

OUR DECISION

[8] We would begin by examining the reasons given by the LJ in arriving at his decision. A summary of the same is as follows:

(a) the plaintiff had not adduced any evidence at all on the circumstances surrounding the alleged request by the defendant for the RM7m advance. There is no written communication adduced between the parties leading to the alleged advance. Neither did the plaintiff's witness give any testimonies on any oral communication from the defendant requesting for the advance;

(b) the plaintiff also did not adduce any agreement executed between the plaintiff and the defendant in respect of any advance, let alone the RM7m that was paid to the defendant pursuant to the payment vouchers;

(c) significantly, there was also no resolution by the plaintiff's Board of Directors approving the advance of RM7m to the defendant;

(d) there is also no testimony from the plaintiff's sole witness giving details to this court of the terms and conditions for the purported advance to the defendant, including the repayment date for the advance, if any. The alleged advance was paid to the defendant in end of 2017 and based on the evidence before the court, no demand for the repayment for such alleged advance was ever made against the defendant until a month before the filing of this suit when the plaintiff out of the blue sent out the letter of demand dated 24 April 2019 for the repayment of such alleged sum;

(e) on the other hand, the defendant's witnesses, DW1, DW2, DW3 and DW4 have all testified that the RM7m was the agreed 'commission' or 'brokerage fee' that the plaintiff had agreed to pay to them as the consideration for procuring for the plaintiff 32% of the shareholding of Ta Win representing a controlling interest that entitled the plaintiff to appoint a representative on the board of directors of the company;

(f) in this regard, there is no dispute that the defendant did acquire 8% of the shareholding of Ta Win and that the plaintiff did, albeit jointly with the defendant, ultimately control the board of directors of Ta Win;

(g) the plaintiff did not dispute that it was a special purpose vehicle incorporated to acquire the shares in Ta Win. It also did not dispute that DW1, DW2, DW3 and DW4 as the shareholders of the defendant played a role in setting up meetings and persuading those having the controlling block in Ta Win to sell their shares to the plaintiff;

(h) as a special purpose vehicle, it is odd indeed that the plaintiff would make an advance to the defendant. More so when the evidence that the plaintiff had encountered financial difficulty was not seriously challenged by the plaintiff. It is illogical for the plaintiff to make the advance when it was at the time facing financial difficulty to meet its objective of acquiring 32% of the Ta Win shares;

(i) more importantly, the payment vouchers relied upon by the plaintiff are not without issues. Section 67 of the Evidence Act 1950 clearly stipulates that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting shall be proved to be in his handwriting;

(j) in our instant case, notwithstanding that the authenticity of the notation in the two payment vouchers is being challenged by the defendant, the plaintiff had chosen not to call the clerk who had prepared the payment vouchers or the company secretary who the plaintiff alleged had knowledge of the plaintiff's general ledger as witness to substantiate its claim. In fact, PW1 did not deny that he had signed on the plaintiff's general ledger which confirmed that the RM7m was part of the monies spent for the purchase Ta Win shares. It was not recorded as an advance to the defendant; and

(k) both the clerk and the company secretary would have been in a position to adduce the best evidence available as they would be able to testify on the notation in the payment vouchers and the entry in the general ledger. However, there was no explanation proffered for the absence of these witnesses.

[9] It was common ground that at the court below, there was only one core

A issue for determination namely, whether the sum of RM7m was an advancement given to the respondent or a commission to the respondent for arranging the shares in Ta Win Holdings Bhd for the plaintiff.

B **[10]** In essence, the case before the trial court revolved around the issue whether the evidential burden lay upon the appellant/plaintiff to satisfy the court on a balance of probabilities that the sum of RM7m was paid to the respondent as an advancement. It was the respondent's position that based on all the evidence adduced at trial, there was not a shred of documentary evidence to prove that the appellant and respondent had entered into an agreement for C the money to be paid as advancement. Hence, that the LJ had correctly found that the appellant had never adduced any agreement in respect of any money advanced and that there is no resolution passed by the appellant's board of directors approving the advance of that RM7m to the respondent.

D **[11]** The respondent contended that it is an undisputed fact that the sum of RM7m had been received by the respondent for the purpose of acquiring 32% of shares in Ta Win Holdings Bhd as evidenced by and clearly reflected, in the appellant's general ledger where the sum was recorded under the E 'Investment — TAWIN'.

[12] Amongst others, the respondent highlighted to us that nowhere in the said general ledger was it recorded that the said sum of RM7m was an advancement to the respondent. Hence, that s 101 of the Evidence Act 1950 F ('the EA') would apply in this instance against the appellant who had the onus of proving the existence of this particular fact which was disputed by the respondent. Likewise, that since the purported advancement was a particular fact raised by the plaintiff itself, it was for the plaintiff to prove it pursuant to s 103 of the EA.

G **[13]** We will look briefly at the evidence relied upon by the appellant in the court below. It was given by the appellant's sole witness, PW1 who testified that the general ledger which recorded the total sum of RM7m under the 'Investment — TAWIN' was signed by him. The respondent highlighted to us H that there is absent in the general ledger entry the word 'advancement' which apparently proved that the RM7m paid to the respondent was not in the form of a loan as PW1 himself had classified it as an investment. Being an investment, the appellant was said to be not entitled to subsequently demand for its return as the profitability of the investment was not a commercial I certainty.

[14] Primarily, the essential question that arose for our determination was whether the LJ had correctly come to a finding that as the appellant had failed to establish the repayment terms of the said advancement of RM7m, there was

no proof that it was really a form of advance or loan to the respondent. In this regard, the respondent relied on the trite principle that until and unless a plaintiff has discharged its legal and evidential burden of proving its claim, the burden does not shift to the defendant to prove its defence, no matter how weak the defence is (see: Court of Appeal's decision in *Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd* [2016] 1 MLJ 375; [2015] 9 CLJ 902).

[15] It was common ground that the appellant in making out its case placed heavy reliance on the payment vouchers exhs P1 and P2 to establish that the RM7m paid to the respondent was an advance. However, the respondent disputed the contents of the said vouchers and submitted before us that the evidential burden lay on the appellant to prove the contents of exhs P1 and P2 in view of the challenge to the admissibility and truth of the contents. It thus followed that the appellant had the duty to call the material witness who prepared the vouchers which the appellant failed or omitted to do in this case.

[16] In contrast to the position strongly taken by the respondent that the appellant had manifestly failed to discharge its onus of proof to show a prima facie sustainable claim, the thrust of the appellant's position was that the sole testimony of its witness (PW1) would suffice to shift the onus of proof to the respondent as his testimony was backed by unchallenged documentary evidence. The pieces of unrebutted documentary evidence supporting the appellant's position were purportedly as follows:

(a) payment voucher dated 3 November 2017 (exh P1);

(b) a copy of a cheque for the sum of RM5m dated 3 November 2017;

(c) payment voucher dated 3 November 2017 (exh P2);

(d) a copy of a cheque for the sum of RM2m dated 15 November 2017; and

(e) plaintiff's statement of account dated 30 November 2017.

[17] It was further contended that PW1's evidence supported by the silent documentary evidence should be preferred as against the oral testimonies of the respondent's witnesses based on the recollection of past events as the same carried lesser weight compared to the mutual documentary evidence.

[18] In our view it was rightly highlighted to us by the appellant that the respondent's allegation that exhs P1 and P2 were tampered with should be viewed with caution as despite making the serious allegation of tampering, the respondent failed to take the following steps:

(a) lodge a police complaint the moment they first became aware of the existence of exhs P1 and P2 (lodged a police complaint on 7 October 2020 almost 14 months later after the bundle of documents was served on them);

(b) the respondent filed the discovery application on 6 August 2019 and thereafter, filed the striking out application on 17 June 2020 and therefore, the respondent was well aware of the existence of exhs P1 and P2 for eight months with the notation in the payment vouchers;

(c) notify or write to the appellant that exhs P1 and P2 were forged, altered, or tampered and that the respondent was seeking legal advice on the effect or validity of these exhibits; and

(d) commence a court proceeding to challenge exhs P1 and P2 at the earliest opportunity.

[19] We are also inclined to agree that the following aspects of the defence evidence are of significance that merited serious consideration:

(a) DW2 had signed the payment vouchers (exhs P1 and P2);

(b) No evidence had been adduced by DW2 to prove that the two exhibits were forged or tampered with by the appellant; and

(c) exhs P1 and P2 are to be received as evidence as the respondent's witness Dato' Ngu (DW2) had not led positive evidence to show that exhs P1 and P2 are inadmissible in law and/or the facts.

[20] It was the appellant's contention on the crucial documentary evidence in support of its case ('exhs P1 and P2') that they had fulfilled the requisite conditions for the admissibility of these documents by virtue of the provisions of s 73 of the EA which for convenience we would reproduce below:

> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on the production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) if the maker of the statement either —
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be

supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

Reference made to *Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd* [2016] 8 MLJ 739.

[21] Our attention was also drawn to the fact that the respondent had failed and/or refused to produce any positive evidence, despite having been challenged to produce its accounting records or the accounts or at the very least, to call the person in charge of its accounts to give evidence, to prove that the sum of RM7m was a commission paid by the appellant. Being a substantial sum of RM7m received by the respondent, one would have expected it to be captured in the respondent's audited accounts as 'Advance from' or 'Commission received' as the case may be.

[22] The appellant had purportedly also equally fulfilled the pre-requisites of s 73A of the EA for admission into evidence of the statements in exhs P1 and P2.

[23] The central question that arose for our determination was whether on the basis of the documentary evidence adduced through PW1, the appellant had proven its case on a balance of probabilities. In this regard, the factual matrix in the court below supported by the evidence as a whole ought to be given due consideration and probative value.

[24] It is important for us to bear in mind the appellant's pleaded case which was that the payment of a sum of RM7m was as an advance/interest free loan to the respondent and not as a commission. The payment had been recorded in the appellant's payment vouchers and not denied by the respondent.

[25] It was conceded by the appellant that they bore the burden of proof under s 101 of the EA and the onus of proof or evidential burden under s 102 of the EA which had distinct meanings and implications. Be that as it may, in the face of ample contemporaneous evidence adduced as proof of payment of RM7m to the respondent which was unchallenged, the question was whether the respondent had sought to rely on a new matter by alleging that the payment was as a commission, not a friendly loan or advancement.

[26] Under the circumstances alluded to, we would uphold the appellant's contention that the onus of proof shifted to the respondent to prove that the purpose of payment of this substantial sum was as an alleged commission and not as an advancement as asserted by the appellant consistent with its pleadings. We must emphasise that it is a particular fact, the existence of which was asserted by the respondent only and not supported by any documentary evidence.

[27] Importantly, the respondent's witness admitted having signed exhs P1 and P2 while alleging that the notation on these payment vouchers was tampered with or forged. As such, the respondent contended that these two exhibits should be rejected in toto or should be regarded as having no evidential value. We are not inclined to agree with this proposition as a mere notation would not, in our view, render the documents which DW2 had admitted having signed to be devoid of any evidential value. Equally important is that the receipt of the payments as evidenced therein was undisputed.

[28] It is trite law that the standard of proof of forgery, is on a balance of probabilities (see: (i) *Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [2001] 1 MLJ 57; and *Great Eastern Life Assurance (M) Bhd v Siu Yan Tam & Anor and another appeal* [2014] 5 MLJ 854).

[29] In our considered view, a mere bare allegation or statement that a written notation was a tampering of a document or forgery without more would not satisfy the burden of proof of forgery. Having taken a close look at the evidence of DW2, especially under cross-examination of his version pertaining to the alleged alteration on the description of the payment in exh P2 which according to DW2 was different from what the notation states to be the purpose of the payment, we have no hesitation in holding that the respondent's allegation of forgery and tampering is not supported by any credible evidence that is capable of contradicting the appellant's version on the issue at hand.

[30] In gist, the undisputed facts as follows highlighted by the appellant sufficiently contradicted the respondent's allegation:

(a) exhs P1 and P2 had been in the possession of the respondent since as early as August 2019;

(b) no application was filed before the court to produce the original documents;

(c) despite having knowledge of the document since 2019, the respondent did not lodge a police complaint on the purported forgery/tampering against the appellant; and

(d) despite knowing the case against the respondent, the respondent had elected not to produce any contemporaneous documents to disclaim the appellant's claim.

[31] We would conclude on the dispute pertaining to the validity and probative value of exhs P1 and P2 that as the appellant had duly produced the original documents and DW2 himself had admitted having signed these exhibits, the appellant had adduced sufficient evidence to discharge its onus of proof. Hence, the evidential burden shifted to the respondent to adduce sufficient evidence to prove the serious allegation of forgery and/or tampering. In all the circumstances alluded to, the respondent had clearly failed to discharge the onus of proving this sweeping allegation that exhs P1 and P2, which were central to the appellant's claim were not genuine.

[32] For good measure, we would cite with approval a case in point, *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 where it was held:

> The onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay on those who challenged the will.

[33] We would lastly deliberate on whether the LJ had determined the case on an unpleaded issue. It was impressed upon us that the sole determinant issue that arose for the LJ's determination was whether the sum of RM7m is an advancement given to the respondent or whether it was meant to be a commission to the respondent for arranging the acquisition of the Ta Win shares for the appellant.

[34] It is settled law that when an issue or matter like forgery is unpleaded, there is no duty nor is the trial judge required to hear and determine a claim on that unpleaded issue or matter. There is no dearth of authorities for the trite law principle that parties are bound by their pleadings and the trial of a suit should be confined to the pleas on which the parties are at variance:

(a) *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; and

(b) *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1, the Federal Court held:

> It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues to which they have not pleaded.

CONCLUSION

[35] With respect to the LJ and the respondent, we are constrained to disagree with respondent's submission that the LJ had not erred in law and fact

when ruling that the appellant had failed to call any material witness who prepared the payment vouchers to explain the notation found in the payment voucher. The LJ was incorrect to draw an adverse inference against the appellant for this purported failure.

[36] The respondent's concluding submission was that based on the documentary evidence at the trial, although the payment vouchers were checked and approved by DW2 as a favour to DW1, the notation on the payment voucher exh P2 does not belong to him.

[37] Hence, it was submitted that, as the documents P1 and P2 were not wholly in DW2's handwriting in view of the impugned notation, exhs P1 and P2 are not wholly admissible as no material witness had been called to prove the notation as s 67 of the Evidence Act 1950 clearly stipulates that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting shall be proved to be in his handwriting.

(See *Mariaton Darussalam & Anor v Abdul Rahim Omar & Ors* [2016] 5 CLJ 611.)

[38] For the foregoing reasons, we are inclined to hold that the LJ had plainly erred in law and fact in arriving at his findings and ultimately his decision by reason of having failed to properly consider and judicially appreciate the facts and circumstances put before him in totality and to correctly apply established legal principles to the instant matter in dispute. This was particularly so in failing to appreciate that the respondent's unfounded contention of commission being the basis of the payment received resulted in immaterial evidence having been taken into account as opposed to undisputed documentary evidence.

[39] At the conclusion of this appeal our judgment with brief reasons given was as follows:

We find that the LJ had not fully and judicially appreciated the fact that such an important allegation of tampering exhs P1 and P2 with respect to the typewriter and handwritten notation of the RM5m and RM2m amount received respectively were not pleaded.

The handwriting of DW2 was not challenged and the evidential burden shifted to the defendant. The defendant could always produce their general ledger or audited accounts to show that the substantial sum of RM7m was received as a commission and not captured as a loan.

This would have settled the matter.

The police report was only lodged some 18 months later. We are satisfied that the original had been produced via zoom in the hearing and indeed if the defendant had wanted to examine the original, they could have filed a discovery application for the original to be produced and inspected.

Their application to amend was not allowed and the contemporaneous documents must be taken to mean what they say especially when the defendant themselves have exhibited them in their striking out application without any qualification that the two payment vouchers have been tampered with.

We are satisfied that the LJ had erred and had failed to appreciate that the evidential burden had already shifted to the defendant in the circumstances of the case and the defendant had failed to rebut that evidence of the plaintiff.

Therefore, we find merits in the appeal and we accordingly allow the appeal and order judgment to be entered as prayed for in the sum of RM7m together with interest at 5%pa as prayed from the date of filing of the writ.

The order of the High Court is set aside and we order costs of RM70,000 here and below to the appellant subject to allocator.

The amount of RM20,000 already paid to the respondent's solicitors is to be refunded.

Appeal allowed; HCJ order set aside with costs of RM70,000 here and below to appellant subject to allocator; RM20,000 paid to respondent's solicitors refunded.

Reported by Dzulqarnain Ab Fatar